



**Kiptai v Republic (Criminal Revision E011 of 2024)
[2024] KEHC 4785 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4785 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL REVISION E011 OF 2024**

RB NGETICH, J

MAY 9, 2024

BETWEEN

SYLVESTER KIPTIONY KIPTAI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant was charged with the offence of attempted murder contrary to Section 220 (a) of the *Penal Code*. The particulars of the offence are that the accused on the 25th day of September, 2020 at around 2000 hrs at Kapkelelwa village in Baringo Central Sub-county within Baringo County willfully and unlawfully attempted to cause the death of Esther Chemjor by shooting her with a bow and arrow.
2. On 22nd August, 2022 the charge and its full particulars were read over and explained to the applicant who denied the charge and the matter was fixed for hearing on the 5th September, 2022.
3. Upon close of trial the trial, by judgment delivered on the 12th day of October, 2021 the accused was found guilty, convicted and sentenced to serve 12 years imprisonment.
4. Dissatisfied and aggrieved by the trial court’s decision, the applicant lodged an appeal being Kabarnet High Court Criminal Appeal No. E001 of 2023. When the appeal came up for hearing on the 5th July, 2023, the applicant informed the court that his prayer is to have the period served in remand considered. The court ordered that the period served in remand from the 27th September, 2020 to 12th October, 2021 be reduced from the sentence imposed.
5. The applicant has now filed application dated 15th February, 2024 seeking for revision of his sentence of 12 years imprisonment. He relies on Article 50(2) (p) (q) and Section 362 as read with Section 364 of the *Criminal Procedure Code*. He prays for Probation Sentence. The applicant states that he has made efforts to reach out to the family of the deceased and has sought for forgiveness from them and



- the response has been positive which is a motivation to pursue this petition for review of sentence and prays for non-custodial sentence.
6. The applicant further states that he was arrested as a young man but has now matured and urge this court to grant him a second opportunity of shaping up his life that has been ruined by the long sentence he is serving; that he is now remaining with under 4 years; that he has made peace with God and he is now born again and has done several biblical courses with certification and he is currently undergoing vocational training programs at the prison.
 7. Through a letter filed in court on the 11th March, 2024, the applicant is requesting for leave to amend grounds of Petition No. E095 of 2023 in accordance with the provisions of Section 350 (v) of the Criminal Procedure Code. The amended grounds of appeal is that the petitioner's constitutional right had been breached when the trial court convicted and sentenced him to serve an unlawful sentence in contravention of Section 389 of the Penal Code. The applicant relies in the authority in the case of Evanson Moiruri Gichane vs Republic CA No. 277 of 2002 which held that Section 389 of the Penal Code provides a general penalty for attempted felonies among them attempted murder which was against the letter and the spirit of the Constitutional Provisions Article 2 (5) of the Constitution.
 8. That the decision further held that Section 389 prescribes a maximum of 7 years imprisonment for an attempt to commit a capital offence. That therefore the conflict of the law should be resolved in favour of the appellant.
 9. In response, the prosecution counsel Ms. Ratemo requested that a social inquiry to be done and the report to be filed. She further requested that the Applicant avail the certificates he mentioned to court. The court directed that a social inquiry report to be done.
 10. From the report, the applicant comes from a humble background and has never experienced parental love in that he used to stay with his grandparents. The applicant's uncle said the family have not reconciled with the victim even though they are neighbors. He added that the victim did not want reconciliation but wanted the applicant to serve a custodial sentence. The uncle prayed for the applicant's early release but he however did not show any interest in facilitating community rehabilitation. He said the main cause of conflict was land boundary with the victim. Probationer's efforts to reach out to the applicant's father proved futile. The uncle confirmed that the applicant's wife relocated to Kabasis area and the wife confirmed that she is now married to another family and her prayer was for applicant to be released so that he can take care of his children. The inmate stated that he used to take alcohol and currently suffering from stomach ulcers.
 11. The circumstances of the case as revealed during the social inquiry are that the applicant went to the victim's home at around 8:00 p.m., while armed with bow and arrow and found the victim sitting outside; out of anger, he shot the victim due to land conflict. He prayed to be released so that he can take up his parental responsibility and says if released, he will settle at his home area Kapkelelwa.
 12. The victim who is aged 52 years opposed release of the applicant on ground that since she was injured, the accused's family have not taken any step to initiate reconciliation process and secondly, she has not healed well and she cannot do heavy duties. She prefers that the applicant completes his sentence in prison so that he learns a skill that will be of help to him in future.
 13. The local administration together with the village elder indicate that applicant is well known to them and that he is one of the troublesome individuals within the community. They say the applicant is unpredictable in character while under the influence of alcohol. The village elder added that, the applicant's family have not shown any interest to facilitate reconciliation and if the application is granted non-custodial sentence, his supervision will be challenging since none of his family members



is willing to facilitate rehabilitation. The local administration are opposed to accused's early release or being given community rehabilitation because he is still not wanted within the community; that the victim and her family members are still bitter towards the applicant; that applicant's parents are not present at home and the uncle who is his guardian showed no interest in facilitating his re-integration, supervision and resettlement within the community once he is released. The probation officer's recommendation is for the applicant to complete his sentence in prison.

Determination

14. The application herein invokes the revisional jurisdiction of this court which gives the court powers, in appropriate cases, to review and vary any orders, decision or sentence passed by the trial court if the court was satisfied that the impugned order, decision or sentence was illegal or was a product of an error or impropriety on the part of the trial court. If the court was so satisfied, the law mandates it to make appropriate orders to correct the impugned order, decision or sentence and align it with the law. The above is the import of Section 362 as read with Section 364 of the [Criminal Procedure Code](#).
15. The applicant argues that convicting and sentencing him to serve an unlawful sentence in contravention of Section 389 of the [Penal Code](#), the trial court breached his constitutional right. He cited the case of *Evanson Moiruri Gichane Vs Republic* CA No. 277 of 2002 where the court held that Section 389 of the [Penal Code](#) provides a general penalty for attempted felonies among them attempted murder which was against the letter and the spirit of the Constitutional Provisions Article 2(5) of the [Constitution](#).
16. The Appellant in this case was charged with the offence of attempted murder contrary to Section 220 (a) of the [Penal Code](#) which provides as follows:-

Any person who—

 - (a) attempts unlawfully to cause the death of another; or
 - (b) with intent unlawfully to cause the death of another does any act, or omits to do any act which it is his duty to do, such act or omission being of such a nature as to be likely to endanger human life, is guilty of a felony and is liable to imprisonment for life.”
17. The Petitioner argue that his rights under Article, 50 (2) (b) (c) and (p) have been violated by the conflicting Sections 220(a) and 389 of the [Penal Code](#) and seeks redress for alleged violation of his rights under the Bill of Rights.
18. Section 389 of the [Penal Code](#) provides as follows:-

“ Any person who attempts to commit a felony or a misdemeanor is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years.”
19. The lower court convicted the appellant and sentenced him to 12 years imprisonment for the offence of attempted murder contrary to Section 220(a) of the [penal code](#). Section 220(a) of the [penal code](#) provide for sentence of life imprisonment. The penalty of attempt to commit a felony under section 389 of the [penal code](#) is imprisonment for not more than 7 years.
20. The Petitioner was charged under Section 220 (a) of the [Penal Code](#) which provides the maximum sentence for attempted murder as life imprisonment. However, Section 389 provides the sentence for



an attempted felony as being imprisonment for a term not exceeding seven years if the intended offence is punishable by death or life imprisonment.

21. In my view Section 220(a) and section 389 of the [penal code](#) pose a conflict as section 220(a) provide for life sentence yet the offence committed is an attempt to commit a felony which in this case is murder. Section 4 of the [Penal Code](#) defines a felony as an offence which is declared by the law to be a felony or if not declared to be a misdemeanor, is punishable, without proof of previous conviction, with death, or with imprisonment for three or more years.
22. The Petitioner contends that the conflict between the aforementioned two Sections of the [Penal Code](#) infringed on his right to a fair trial under Article 50 of the [Constitution](#). Specifically, the right to the benefit of the least severe of the prescribed punishments for an offence as enshrined under Article 50 (2) (p) of the [Constitution](#).
23. Article 259 of the [Constitution](#) provides that the [Constitution](#) should be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance. The Constitution should be given a purposive interpretation where all provisions are read as a whole with each provision sustaining the other.
24. In this case, the Petitioner opines that the conflict created between Section 220(a) and 389 of the [Penal Code](#) infringes on his rights as enshrined in the [Constitution](#). This court must therefore analyze Sections 220(a) and 389 of the [Penal Code](#) vis-à-vis the Petitioner’s alleged violated rights.
25. The Supreme Court in the case of [Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others](#), Supreme Court Petition No. 26 of 2014 [2014] eKLR, opined that a purposive interpretation should be given to statutes so as to reveal the intention of the statute. The court observed as follows:

“In *Pepper vs. Hart* [1992] 3 WLR, Lord Griffiths observed that the “purposive approach to legislative interpretation” has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:

“The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.”

26. While analyzing how to determine the intention of a statute, the Court of Appeal in [County Government of Nyeri & Anor. Vs. Cecilia Wangechi Ndungu](#) [2015] eKLR held that:

“Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their



aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors.”

27. Article 50 of the Constitution guarantees the Petitioner the right to a fair trial which includes under sub-article (2) (p), the right to the benefit from the least severe of the prescribed punishments for an offence. Sections 220 (a) and 389 of the Penal Code provide sentences for the crime of attempted murder. In my reading of both provisions of the Penal Code, the drafters of the legislation seem to have created two sentences for the offence in question. This gives rise to a conflict which can only be resolved by way of amendment. Be that as it may, the Constitution courtesy of Article 2 is the supreme law and any other legislation is subordinate to it. The Constitution gives an accused person a right to the least severe sentence which in this case is that provided by Section 389 of the Penal Code.
28. The court of appeal has dealt with instances where appellants faced with similar circumstances as the Petitioner were accorded the benefit of the least severe sentence during their appeals before the Court of Appeal. See the cases of Evanson Muiruri Gichane vs. Republic [2010] eKLR and Boniface Juma Khisa vs. Republic [2011] eKLR. It would be in line with the provisions of Article 27 to accord the Petitioner the same treatment.
29. In view of the above I find that in respect to sentencing, there is conflict between Sections 220(a) and 389 of the Penal Code. Section 220 (a) of the Constitution denies the applicant opportunity to benefit from a lesser sentence provided for attempts to commit felonies under Section 389 of the Penal Code therefore violating the applicant’s right under 50 (2) (p) of the Constitution.
30. In the case of Evanson Muiruri Gichane vs. Republic (supra) the Court of Appeal addressed the conflict between Sections 297(2) and 389 of the Penal Code as follows:-

“We have considered this ground of appeal and submissions by both Mr. Monda and Mr. Odhiambo and we are of the view that indeed, there may be a contradiction between sections 297(2) and 389 of the Penal Code. The section under which the appellant was convicted provides for death sentence while section 389 provides *inter alia*: -

“...but so that if that offence is punishable by death or life imprisonment he shall not be liable to imprisonment of a term exceeding seven years.”

The appellant was convicted of an offence (attempted robbery with violence) punishable by death. In terms of Section 389 of the Penal Code the appellant shall not be liable to imprisonment of a term exceeding seven years. But he was sentenced to death. The apparent conflict in the law may only be resolved by Parliament. But the appellant is entitled to the less punitive of the two sentences...

We think we have said enough to conclude that the appeal against conviction is unmeritorious while the appeal against the legality of the sentence has merit. Accordingly, this appeal is dismissed as regards the conviction of the appellant but we allow the appeal against the sentence to the extent that we substitute the death sentence with a prison term that will result in the appellant’s release from prison since the appellant was convicted and sentenced on 5th March, 2004 and should have been sentence to imprisonment not exceeding seven years.”



31. Having found that the Petitioner is entitled to benefit from the sentence provided under Section 389 of the Penal Code, this Court makes orders as hereunder.

Final Orders:

32.

1. I hereby find that there is a conflict between Section 220 (a) and 389 of the Penal Code in respect to the sentence for the offence of attempted murder and the conflict violates the Petitioner's rights under Article 50 (2)(p).
2. I hereby declare that Petitioner is entitled to benefit from the lesser sentenced imposed by Section 389 of the Penal Code.
3. Sentence of 12 years is set aside.
4. The applicant to serve 7 years imprisonment.
5. Period served in remand to be computed in sentence above.

Right of Appeal 14 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 9TH DAY OF MAY, 2024.

HON. R. NGEITCH

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

* Ms. Ratemo for the State

* Appellant: present

* Elvis/Momanyi: Court Assistant

